REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. E008 OF 2021

LUCY KAARIA AND DENNIS GITUMA .....APPLICANT

VERSUS

DPP.....RESPONDENT

JUDGMENT

1. The petitioners were on the 01/06/2020 driving along Isiolo – Nanyuki road when at a place commonly known as 'the elephant corridor', their motor vehicle was involved in a traffic accident with a motor vehicle registration No. KAX 894z Isuzu fighter. The accounts of how the accident occurred contrast between the petitioners and the respondents.

2. While the petitioner maintain that the lorry hit them from behind, the respondent says it was the petitioners who overtook a series of motor vehicles then suddenly and abruptly swerved into the lane and path of the lorry thereby hitting it, losing control and hitting the guardrails and coming back to the road to come to a rest while facing the Isiolo direction.

3. When the police came to the scene it appears there was no agreement between the petitioners and the police over how the motor vehicle would be towed and if the two would go to the police station in the police motor vehicle leading to a standstill that lasted more than one hour. In the long run the petitioners were escorted to the police station in a private vehicle, were booked in the cell, later on taken to the hospital, brought back to the police station at about 6 a.m and taken back to the cell before being arraigned in court that morning.

4. In court the 1st petitioner was faced with some nine counts spread over three different charge sheets and registered separately as Meru CMCCR NO. 296, 610 and 611 all of 2020 while the 2nd petitioner faced some four counts split over two charge sheets and registered as Meru CMCCR NO. 612 and 613 both of 2020.

5. The petitioners felt to have been treated with high and heavy handedness which they considered did not confirm to the offices of the police officers they encountered that evening and thus made a complaint to the Inspector General, National Police Service and alleged a litany of improprieties ranging from extortion and corruption, intimidation and harassment, falsification/spoliation of evidence by alteration of the scene of the accident leading to malicious and uncalled for prosecution and absolving the driver of the lorry being the person at fault on the basis of a bribe as well as failure to issue the 1st petitioner with a police abstract regarding the accident. The request was to have the complaint investigated and lawful steps taken to correct any infringement that could have been visited upon the petitioners.

6. That complaint was handled and processed by the internal affairs unit, National Police Service which made recommendations that the police officers who handled the petitioners that night be subjected to disciplinary proceedings in accordance with the provisions of the National Police Service Act. The recommendations were that the officers face some four (4)counts) of disciplinary charges ranging from negligent performance of Police duties, falsification of official records and writing a false letter to the court of Meru alleging transfer of witnesses, willful disobedience of lawful orders as contained in signal Ref No. NPS/IG/SEC/2/3/VOL/Va6 of 2/4/2020, that the charges pending in court be reviewed by the Directorate of Criminal Investigations with a view to terminating same.

7. On the basis of such recommendations by the police service the petitioners contend that the charges are demonstratively made in bad faith having been accentuated by the ulterior motive to avenge failure by the petitioners to pay a bribe and to pay exorbitant towing charges to a company chosen by the police yet the petitioner had called own service provider who was already at the scene. It was equally asserted that the charges facing the petitioners were propelled by a bribe paid to the officers by the same lorry driver who had knocked the petitioner's vehicle from behind so that that driver was spared and the 1st petitioner charged instead.

8. Bad faith is inferred from the fact that the two having been suspected of committing traffic offenses and were entitled to be released on cash bail/police bond, were never released but put in the cells as a way of humiliating them and in obvious violation of a guidelines issued by the Inspector General of Police for guidance of the police on granting cash bail.

9. Discriminative treatment and selective application of the law was then alleged against the police on the basis that there were other civilians at the scene at the time who had no face masks including the police but who were not charged with the offence on covid – 19

protocols and curfew violations.

10. On such complaints the petitioners allege violation of their rights under Article 27 28, 29 and 48 of the constitution. In addition the 1st respondent is accused of failure to carry its mandate in line with Article 157 of the Constitution by allowing lack of bona-fide to guide its performance of duty. On those grounds the petitioners plead and urge that the charges be declared to run affront and in violation of the petitioners rights under article 48 and 50 of the constitution and intended to achieve purposes other than due administration criminal justice and its furtherance, an order of permanent injunction restraining the pursuit of the said charges and general damages for violation of rights together with costs and interests.

11. There was a further Affidavit sworn on response to the two replying affidavits in which the position taken is that the two deponents being the two main actors for the police were not truthful and swore to lies including the allegation that the 1st petitioner was a former administration police officer when she is an advocate and one who had never been trained as a police officer.

12. The petition was opposed by the 1st respondent by two affidavits sworn by an interested party GEOFFREY MANGENI and CPL PAUL KOECH while the 2nd respondent filed grounds of opposition dated 8/10/2021.

13. The opposition by the two affidavits deny any wrongdoing by the officers, blame the petitioners for having been abusive, disrespectful and disobedient to lawful orders on account of being under heavy influence of alcohol. The two officers deny demanding any bribes from the petitioners nor receiving any from the lorry driver and infer that the petitioners were not given bond because they were too drunk and never ask to be given bond. That the petitioners were required to pay for breakdown charges before hand, was denied it being said that the breakdown vehicle was called after two hours of standoff and it belonged to an established service provider who was even employed by the petitioner to tow the vehicle from the police station to the garage for repairs. While PC Paul Koech says that he received the report at 7.30 and proceeded to the scene, was treated to the abuse and use of obscene language from the 1st petitioner for a period of about one hour before he called the breakdown, Inspector Mangeni asserts that there had been a standstill for over two hours before the decision to call a breakdown was realized.

14. The arrogance and disrespect of the petitioners again said to have been shown by refusal to take an alcohol blow test and refused to board the police vehicle after both had been examined at Kiirua Mission Hospital.

15. The treatment of the lorry driver of being released without charges and before the lorry was inspected was explained to have been informed by the need to have the goods aboard delivered and that after delivery in Nyahururu, driver fell ill and had to isolate himself. It is of note that the lorry was not impounded till the 14/8/2020.

16. On the recommendations by the internal affairs unit the respondents position is that the conduct of public prosecution is at the prerogative of the ODPP and the ODPP had directed that the cases save for that of failure to wear a face mask in public would be withdrawn.

17. The 1st petitioner is then accused of being illegally and fraudulently obtained internal police communication and used dubious tactic to delay the conclusion of the court process. The affidavits then exhibited, the fair plan of the scene of accident with regards, the inspection reports for the two motor vehicles and, the letter for ODPP Meru responding to some query for Subuiga police station.

18. For the second respondent only grounds of opposition were filed in which the position taken is that the application is fatally defective as the 2nd respondent has no mandate to represent National Government in Criminal proceedings a mandate given exclusively to the 1st respondent and that the matter here is criminal in nature and the 2nd respondent has been improperly joined and that if granted, the orders sought, will affront the Principle of separation of powers in the constitutional architecture.

19. The petition was lodged simultaneously with an application for conservatory orders but on 19/7/2021 when the matter came before court that application was abandoned as a way of fast tracking the petition with a consent that conservatory orders be granted pending the determination of the petition. On that day timelines were set for filing responses and submissions pursuant to such directions, the petitioners filed written submissions on the 27/01/2022 while those by 1st respondent were filed on the 7/12/2021. The 2nd respondent did not file any submissions.

Submissions by parties

20. The petition was canvassed by way of written submissions which were duly filed by the respondent on 7/12/2021 and by the petitioner on 27th January 2022.

21. In the submissions filed the petitioner, emphasizes the fact that pursuant to section 87 of the National Police Service Act, the first petitioner lodges a complaint with the Police Internal Affairs Unit which in executing statutory mandate returned a verdict that the charges against the petitioners had been propelled by malice and blatant impunity and for selfish purposes and in contravention of the directives by the Inspector General on cash bail with recommendations that the concerned officers be subjected to stern disciplinary proceedings. The decisions in **Lucy Karauki vs Odpp, pet No. 1 of 2015, Samuel Kamau Macharia vs AG and Another, HC Misc App No. 356 of 2020** and **Musyoki Kimanthi Vs Inspector General of Police (2014) eKLR** were cited for the proposition of the law that the High Court ought not interfere with the mandate of the Directorate of Public prosecutions save where there is demonstrated design to achieve ulterior objective away from due administration of criminal justice or where the prosecution would result in abuse of prosecutorial powers.

22. It was then contended that the treatment meted out to the petitioners was outrightly an infringement of their rights under articles thus entitling them to recompense and the decisions in **Akusala A Boniface vs OCS Langata Police station & 4 Others** and **Peris Mutwiri John vs Base Commander and AG Meru Pet No 5 of 2019** were cited for a proposal that the court awards damages in the aggregate sum of Kshs 8,000,000.

23. In its submissions, the 1st respondent submitted that the power of prosecution is based on evidence presented upon conclusion of investigation by police and relied on **Republic v Commissioner of Police & anor Ex-Parte Michael Monari & anor [2012) eKLR** in support thereof. It cited the provisions of Article 157 of the Constitution on the mandate of the ODPP to prosecute criminal matters, which should not be curtailed unless the same can be proved to have been discharged with ulterior motive. It is then submitted that it had employed the necessary checks and balances to evaluate the evidence which is due for determination by the trial court. It faulted the petitioners for failing to prove how and in what way the said prosecution as instituted against them has been prejudicial or was brought by ill motive then relied on **Republic v Attorney General Ex-Parte Kipng'eno Arap Ngeny(2001)eKLR**, on the need to demonstrate a reasonable and probable cause for mounting a criminal prosecution. The respondent then relied on a treatise by Chris Corns, titled **Judicial Termination of Defective criminal prosecution-stay of Application**, on the known grounds for staying or curtailing criminal prosecution as well as the decision in **Jago v District Court (NSW)106,** for the proposition that there must be a fundamental defect which goes to the root of the trial, to justify a permanent stay of criminal proceedings. He reminded the court that the power to stay, discontinue, prohibit or quash criminal prosecutions must be exercised sparingly and with circumspection, as was aptly stated in **Raymond Kipchirchir Cheruiyot & anor v Republic (2021) eKLR** then accused the petitioners of making baseless allegations against the officers and trying to challenge the evidence in the wrong forum. The first 3 prayers in the petition were termed premature, frivolous and an abuse of the court process and the court was urged to be guided by **MWK & anor v Attorney General & 3 others (2017)eKLR**, for the proposition that the unlimited jurisdiction conferred to the High Court by Articles 165(3)(a) and 23(3) of the Constitution ought to be construed in a way that will recognize and uphold its appellate jurisdiction to hear and determine appeals from the lower court. **Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others(2014)eKLR** was cited for the proposition that a party cannot move a court in glaring contradiction of the judicial hierarchal system of the land on the pretext that an injustice will be perpetuated by the lower court together with **Peter Oduor Ngoge v Hon. Francis Ole Kaparo(2012)eKLR**, where the Supreme Court recognized that all courts have the constitutional competence to hear and determine matters that fall within their jurisdiction. It urged the court to allow the criminal matters before the chief magistrates court to continue to full hearing and determination in order for justice to be done to the 1st petitioner's standing and station in society. There was a denial that any of the petitioners' rights had been violated and the petitioners accused of having come to court with unclean hands and the court was urged to dismiss the petition and not to award the petitioners any damages with **MWK case (supra)** being cited on the discretionary nature of award of damages.

Analysis and determination

24. I have appraised the pleadings filed herein, the submissions on record together with the authorities cited and take the view that the pertinent issue for determination is whether the petitioners have made out a case to warrant the disturbing the prosecution set in motion. However before delving into the merits, there is a position taken by the 2nd respondent regarding its joinder to these proceedings which ought to be dealt with preliminarily. The 2nd respondent takes the position that under the constitution, it has no mandate to represent the government in criminal proceedings because that mandate rests with the 1st respondent. That position calls upon the court to look at the mandate of the Attorney General as donated by the constitution at Article 156. Article 156(4)b mandates the Attorney General to represent the National Government in court or in any legal proceedings in which the national government is a party except criminal proceedings. The question is whether the proceedings in this file are criminal. While the challenge is directed at criminal proceeding before the magistrate's court, the proceedings in this file cannot by any imagination be considered criminal. They remain proceedings that attract no criminal sanctions and are never criminal thus. I find no merit in that objection and find that the police service is part of the national government and when questions arise in court on their conduct the Attorney General is the apt respondent. To exclude the Attorney General from such proceedings would be to deny the office of the Attorney General its primary duty to be the Principal legal advisor to the Government.

25. The gist of the petitioners' case is that, the actions of the 1st respondent, in instituting the criminal proceedings against them were capricious, arbitrary and unfair for having been accentuated by bad faith of punishing them for failure accede to unreasonable and unlawful demands by the police.

26. I am of the learning that the mere fact that a person has been charged in court or that the said charges are unlikely to culminate in a conviction, does not in itself amount to a violation of a constitutional right. My take is that the legality of the said charges or their success are merit based and is a matter that can only be determined by the trial court.

27. Here, however, the petitioners allege having been manhandled by the police officers, denied bail and subsequently charged in court with various offenses, in a multiple they made a complaint to the internal affairs Unit of the National Police Service, an internal oversight, for the service, with the mandate of receiving and investigating complaints against police. The functions of the Unit are receiving and investigating complaints against police, promoting uniform standards of discipline and good order in the service, keeping a record of facts of any complaints or investigations made to it, where necessary investigating and recommending appropriate action in respect of any unlawful conduct and hearing complainants from Members of the Service or members of the public.

28. There is a provision in the Bail and Bond Policy Guidelines, echoed in the Police Force Standing Orders, and with constitutional foundation in Article 49(2), which require the officer in charge of a police station to release any person arrested on a minor charge on the security of cash bail, as a general rule, unless the officer has good grounds for believing that the arrested person will not attend court when required to do so, and that the cash bail be handed into court by the date on which the arrested person should appear in court, and a receipt obtained.

29. According to the police officers who have filed replying Affidavits, the reason the petitioners were not given cash bail is because they did not ask for it. That conduct misreads and misconceives the dictate of the constitution the guidelines and the force standing orders. It is the duty of the officer commanding station to do his duty of not remanding in custody a person charged with the kind of offenses the petitioners were charged with. The right to bond is not a favour to be accorded by the officer commanding a station but a right to be enjoyed by the arrested person unhindered. I find that the police officer in charge of Subuiga police station one No 236400, IP Godfrey Mangeni flouted the provisions of the Constitution and aforementioned guidelines when he declined to release the petitioners on bail pending their arraignment in court. That is a violation that is both justifiable and attracts compensation in damages. In fact, being flagrant as determined by the Internal Affairs Unit, the violation was by the named officers, for ulterior motive of selfish benefit, and such officers ought to have been joined in these proceedings.

30. Having been so unlawfully kept in custody, the petitioners were then arraigned and charged with several offenses made to be spread over five files. A keen look at the five charge sheets show that the charges against the 1st petitioner in Meru CMCCR 611of 2020 are the same as those against the 2nd petitioner in Meru CMCCR 612 of 2020. On the same note, the offenses with which the 1st petitioner is charged with in Case Number 610 of 2020 equates with those facing the 2nd petitioner in Case No. 613 of 2020. The concern of all here must be why those sets of charges could not be in one charge sheet! I see no law to militate against such an approach. Again no law prohibits such an approach for it is the duty of all to assist the court meet its mandate by efficient and proportionate employment of time as a public resource at the disposal of the court. One may only suspect that the intention of the police was to, as it were, kuwafunza hawa wajuaji wa haki yao, ya kwamba hawajui. I suspect further that it was necessary to prefer several charges against them so that bond applications and terms of such bond when granted are considered separately and therefore impact a heavier burden upon them. Of course even legal representation would be exacerbated against the dictate of the right to access justice. I find that the decision to craft four charge sheets as opposed to a single charge sheet to take care of cases registered as Criminal case No 610,611,612 and 613 was not done in good faith and for the ends of administration of criminal justice. I find that the propellant was the need to inflict hardship upon the petitioners. When such an ulterior motive is discerned by the court, the court has a duty to correct such.

31. I remind myself that it is the trite law that the burden of proving violation or threat of violation is always upon the petitioners [i][1] and further that the petitioners must clearly and succinctly demonstrate the manner in which the respondents have violated their rights[2]. Here, I read the pleadings to show that the petitioners seek redress for violation of their rights under Articles 28, 29, 48, 49 and 50 of the Constitution and I appraise the evidence from both sides to show that indeed the treatment of the petitioners culminating in their arraignment in court was not in pursuit of the known goals and intendment of administration of criminal justice. Many other questions may be raised including why the many members of the public referred to as by standers at paragraphs 24 of the affidavit sworn by No 68563 CPL Paul Koech as well as para 25 of IP Mangeni's affidavit and the drivers of the vehicles that occasioned a huge jam (Para 9 of CPL koech's affidavit and para 7 of IP Mangeni's affidavit) were never charged with breach of curfew order. Here again it is reasonable to conclude that there was selective application of the law as found by the Internal Affairs Unit.

32. It is to me clear that the arrest and the subsequent prosecution of the petitioners was unlawful and based on flimsy grounds. Similarly, the detention of the petitioners in the police cells without being released on bail deprived them of their various rights and freedoms under the Constitution. I find the actions of the police officers were arbitrary and without a justifiable cause.

33. In ***Republic v Director of Public Prosecution & Another Ex-parte Geoffrey Mayaka Bogonko & anor(2017)eKLR*** , the court observed as follows:-

> **"The circumstances under which the court will grant stay of a criminal process in these kinds of proceedings are now well settled. The court ought not to usurp the constitutional mandate of the Director of the Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legality recognized aim."**

34. I do find that the petitioners have demonstrated to my satisfaction how their rights have been infringed and will continue to be infringed if the proceedings at the Chief Magistrates Court are not brought to a halt.

35. I am thus persuaded that a case has been made by the petitioners to warrant grant of the prayers sought both in the motion and the petition. I do declare that the dominant purpose of initiating and continuing with the Meru CMCCr case No 296, 610, 611,612 and 613 all of 2020 is not the due administration of criminal justice but matters ulterior for which reason I do grant an order of prohibition against the said prosecution.

36. Having found that the petitioners' rights were violated, I come to the conclusion that such violation by a state actor attract remedy by way of vindication. I am guided by decided cases that an assessment of damages even in litigation for enforcement of rights remains at the discretion of the court without any established scientific or mathematical measure. It is also to be appreciated that no amount of money is able to heal a tormented soul and scarred self-esteem. Damages are therefore intended to vindicate the wronged and assuage the injured feeling of deprivation or just violation to the wronged. At public interest level such damages may be seen as a warning to others that violations come with a price to be paid by the violator. Having taken all into consideration including the fact that violators here were never sued to answer to their wrongdoing, I do assess and award to each of the petitioners the sum of Kshs 500,000 being damages for the violations meted against them by the police officers as abetted by the 1st respondent in maintaining and pursuing the otherwise ulterior prosecution.

37. I have said before that the violators ought to have been sued but were not. Had they been sued, this would have been an apt case for an order that they personally pay the damages. However, I take it that the police service when served with this judgment will be able to use the same for its own internal processes.

Rendition

38. From the foregoing analysis, I find that the conduct of the police officers No 236400 IP Godfrey Mangeni, No 68523, CPL Paul Koech

and another officer simply named as PC Eric did violate the rights of the petitioner in the manner they treated them at the scene through to the police station before coming with the criminal charges prompted by ulterior motives. For that reason, the court makes the following orders; -

a) A declaration that in preferring and a pursuing criminal and traffic cases in Meru CMCCr cases Number 269 of 2020, 610 of 2020, 611 of 2020,612 of 2020 and 613 of 2020, the police officers represented by the 2nd Respondent were propelled by reasons other than the due administration of criminal justice for which reason, the said cases ought not to proceed.

b) An order of prohibition directed at the 1st respondent and restraining it from continuing with the prosecution of the petitioner.

c) An award of general damages of Kshs 500,000 to each of the petitioner making an aggregate of Kshs 1,000,000. This award is entered against the two respondents jointly and severally.

d) The costs of the petition are awarded to the petitioners

DATED SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF FEBRUARY, 2022

PATRICK J.O OTIENO

JUDGE

IN PRESENCE OF

MR. MUTUMA FOR PETITIONER

MR. MAINA FOR RESPONDENT

PATRICK J.O OTIENO

JUDGE

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[1] Anarita Karimi Njeru v Republic (1976 – 80) I KLR 1272

[2] Matiba v Attorney General [1990] KLR 666.

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[i]